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November 16, 2000

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Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, N.W.
Washington, DC 20423-0001

Re: STB Ex Parte No. 582 (Sub-No. 1), *Major Rail Consolidation Procedures*

Dear Mr. Secretary or Representative:

Enclosed please find an original and 25 copies of Comments on Notice of Proposed Rulemaking, Served October 3, 2000, for filing with the Board in the above referenced matter.

Twenty-five copies accompany the original. Also enclosed is a 3.5-inch IBM-compatible floppy diskette providing an electronic copy of these Comments (Comments in Word Perfect 7.0 format & Appdx 1 as a .pdf file).

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,

Tom McFarland

Thomas F. McFarland, Jr.
Attorney for IMC Global Inc.

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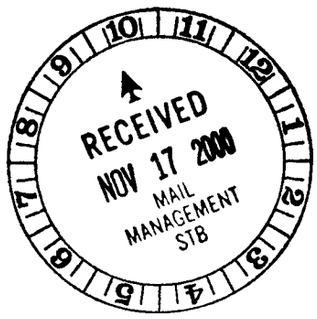
ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD



MAJOR RAIL CONSOLIDATION PROCEDURES	))	EX PARTE NO. 582 (SUB-NO. 1)

COMMENTS ON NOTICE OF PROPOSED RULEMAKING, SERVED OCTOBER 3, 2000

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DUE DATE: November 17, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

MAJOR RAIL CONSOLIDATION PROCEDURES	))	EX PARTE NO. 582 (SUB-NO. 1)

COMMENTS ON NOTICE OF PROPOSED RULEMAKING, SERVED OCTOBER 3, 2000

Pursuant to the procedural schedule established in the Notice of Proposed Rulemaking (NPR) in this proceeding served October 3, 2000, IMC Global Inc. (IMC) hereby submits initial comments on the proposed regulations.[1/] In addition to its own comments, IMC endorses the comments being submitted in behalf of the Alliance for Rail Competition.

GENERAL COMMENTS

IMC applauds the proposed change in emphasis from promoting mergers to enhancing competition, but like Vice Chairman Burkes, commenting, we question whether the proposed changes adequately place the focus on enhancement of rail-to-rail competition, which is what is lost in rail mergers. (NPR at 40, first paragraph). The proposals fail to address major areas of concern raised by numerous shippers and shortline railroads. The rules that have been proposed are exceedingly vague and lacking in accountability.

In several key areas, instead of itself proposing merger remedies, the Board proposes to leave it to the applicant rail carriers to propose remedies for merger-related failures and harmful effects. It is evident to IMC that merger applicants will not come forward with aggressive

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1/ IMC submitted comments in response to the Advance Notice of Proposed Rulemaking in this proceeding, in which its identity and interest were described.

remedies that would be required in the public interest. Instead, the proposed regulations would serve as a guide for applicants on how to structure merger applications to avoid accountability.

SPECIFIC COMMENTS

1. Failure to Preclude Rail Carriers from Raising Captive Shipper Rates to Recover Acquisition Premiums

Recent rail mergers have been characterized by bidding wars, in which two rail carriers vying to acquire a third have pushed acquisition prices far above what otherwise would be fair value for the acquired carrier. The price paid for Conrail after a spirited bidding contest between Norfolk Southern and CSX is the most recent instance of a premium paid for an acquired rail carrier following a bidding war.

The merger applicant or applicants who pay those acquisition premiums invariably seek to recover them by raising rail rates for captive shippers. That is occurring at present as to the premium paid for Conrail. IMC is aware that Norfolk Southern and CSX have instituted programs whereby upper management is reviewing every rate contract renewal and new rate quote with the intention of squeezing the maximum amount of revenue from every captive shipper rate. That program is described at page 2 of the October 30, 2000 issue of Rail Business, copy attached to these comments as Appendix 1.[2/]

It is anticompetitive for captive shippers to be gouged with huge rate increases so that a rail carrier having overpaid to acquire another can recover the acquisition premium that it paid. Such anticompetitive activity is directly rail-merger-related. Yet the proposed rules do not address that competitive abuse at all.

[2/] IMC is not the shipper referred to in that article.

A regulation should be added to the proposal that would prevent acquiring rail carriers from recovering acquisition premiums by raising captive shipper rates.

2. Failure to Address Existing Competitive Harms Caused by Recent Rail Mergers

IMC agrees strongly with Vice Chairman Burkes, commenting (NPR at 40), that the Board should look at the "upstream" effects of rail mergers, in addition to their "downstream" effects. That is, in evaluating a proposed rail merger the Board should look at the entire competitive picture, not merely the future effect of the proposed merger.

The Board should take into account numerous anticompetitive situations in the rail industry that exist in large part as a result of Board or ICC action is rail merger cases or other proceedings. The NPR speaks of requiring rail merger applicants to keep gateways open. However, the fact is that numerous competitive gateways already have been officially or commercially closed as a result of concerted rail carrier action that was expressly sanctioned by the ICC. *See, e.g., Traffic Protective Conditions*, 366 I.C.C. 112 (1982). Shippers have been frustrated by the Board's restrictive position on rail carrier competitive access, as typified by its decision in *Midtech Paper Corporation v. CNW*, 3 I.C.C.2d 171 (1986). Shippers have viewed the Board's decision that rail carriers are not required to establish bottleneck rates as inimical to enhancement of rail competition.

In IMC's view, the Board's lack of commitment to enhancing rail competition in merger cases was exposed recently in the *Union Pacific-Southern Pacific* case when it refused Montana Rail Link's request for divestiture of one of the merged company's parallel Central Corridor transcontinental routes. Instead, the Board ordered trackage rights over one of those routes for a

carrier who already had its own transcontinental routes via other corridors, and with whom the merged company constituted a duopoly for Western rail traffic.

If the Board has now truly seen the light on the need to enhance rail competition in merger cases, it should make aggressive use of the divestiture and competitive access powers explicitly granted to it by Congress in the merger statute, 49 U.S.C. § 11324(c). Moreover, as suggested by Vice Chairman Burkes, aggressive use of that power should be designed to enhance existing rail competition as well as competition that would be affected by the proposed merger.

3. Absence of Standards and Sanctions for Failure to Achieve Promised Service Improvements

The regulations must recognize that rail service is required to improve as a result of a merger, not worsen or stay the same. It is essential to protect against the very harmful service disruptions that have occurred following recent mergers, e.g., Norfolk Southern-CSX-Conrail; Union Pacific-Southern Pacific; Union Pacific-C&NW. But that is not enough.

Applicants routinely claim that mergers will result in significant service improvements. There is a distinct need for performance measures by which pre-merger and post-merger service can be compared. Applicants should be required to show the manner and extent to which rail service will be improved as a result of a proposed merger. Most importantly, there should be meaningful and enforceable penalties if the promised service improvements do not materialize. Otherwise, the rail shipping public will continue to be faced with service that falls far short of what the applicants promised as a means of securing Board approval for their merger proposal. Far too often, only the rail carrier applicants benefit from a merger, while promised public benefits are never delivered.

Instead, the proposed regulation (§ 1180.6(b)(11)) would leave it to the applicant rail carriers to suggest measures to police themselves on this critical subject matter, viz.:

> . . . (A)pplicants must suggest additional measures that the Board might take if the anticipated public benefits identified by applicants fail to materialize in a timely manner.

Use of the term "additional measures" implies that the Board itself provided measures elsewhere for remedy of failure to deliver promised merger benefits. That is not the case. All that the proposed regulations provide is the proposed self-regulation suggested in subparagraph 11 above. IMC strongly opposes that proposal as insufficient and inappropriate.

4. <u>Failure to Provide Meaningful Protection for Shortline Rail Carriers</u>

In many instances, effective rail competition for shipper traffic is provided by shortline rail carriers rather than two or more Class I carriers. In IMC's experience, shortline rail carriers often are willing to compete for traffic far more aggressively than Class I rail carriers are willing to compete with each other. Rail competition provided by shortline rail carriers is very much in the public interest.

The proposed regulations do not provide for meaningful protection for shortline rail carriers as a result of mergers. IMC strongly agrees with the American Shortline and Regional Railroad Association that the "Short Line and Regional Bill of Rights" should be incorporated into the proposed rules. Adoption of those "rights" would go a long way toward the identified goal of enhancing rail competition. Thus, rail competition would be enhanced if shortlines were to be entitled to compensation for merger-related failures; if shortlines were freed of routing constraints; if shortlines were entitled to competitive and nondiscriminatory pricing; and if shortlines were to enjoy unrestricted interchange rights.

Those pro-competitive provisions belong in regulations truly designed to enhance rail competition.

5. Corresponding Amendment of Competitive Access Rules

If more liberal competitive access is to be provided as a condition to rail merger in order to enhance rail competition, more liberal competitive access should also be provided in a nonmerger setting. Otherwise, shippers served by a carrier having received competitive access as a condition to a rail merger would have an unfair competitive advantage over shippers served by a carrier not involved in the merger, who does not receive competitive access.

In order to prevent such unfair treatment, the Board should liberalize its regulations that cover competitive access generally. Those regulations are found at 49 C.F.R. § 1144.5. In IMC's view, those very restrictive current regulations are out of step with the pro-competitive intent of Congress in the Staggers Rail Act, e.g., 49 U.S.C. §§ 10101(1), (4), (5), (10) and (12). Without question, those existing regulations are not in keeping with the emphasis on competitive enhancement in the proposed rail merger regulations. Those regulations should be amended to provide for liberalized competitive access to enhance rail competition generally, and to harmonize them with the proposed regulations governing rail mergers.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the proposed regulations should be amended to implement the matter contained in the foregoing comments.

Respectfully submitted,

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DUE DATE: November 17, 2000

Hot Spots

Area: Chicago, Ill.
Carrier: NS

Ask any shipper about his or her main concerns with Class I carriers, and you'll hear one of two things: rates are too high, or service is unreliable. Hot Spots typically follows the service complaints, but a compelling letter from an Illinois shipper to **Rail Business** underscores a recent development with NS: a sizeable hike in rates.

"Our NS account rep just advised me that a contract coming up for renenwal will be increased by 8%," he writes, adding that the figure is twice as high as any rate increase he's seen on contract traffic.

"I've also been advised that this is the beginning of a new program," he added, "to have NS upper management review each and every rate contract renewal and new rate quote with the intention of squeezing the maximum amount of revenue that [NS] can get."

The shipper continues to describe a captive customer's worst fear: gouging. "They will only back off under situations of competitive threat" by a second carrier, he writes, noting that the account rep claimed this didn't just apply to the particular shipper, but to all business. And forget about the give-and-take between a shipper and his account rep. "Our rep advises that this will be way above his level and out of his hands," he continues. "He and the other reps become the messengers."

"If this isn't blatantly obvious [evidence] that the shippers will finally be paying for the merger, then I don't know what is," the shipper writes. He added that some negotiating tools might help offset the increase on some points, though not all. "Although I feel that I'll be able to bring down the increase amount on some specific points, there will be limits to what I can do under this 'policy.' We've also advised the **American Chemistry Council** and I'm certain that the ACC will be hearing from many members about this."

ACC spokesman Mike Heimowitz said that the ACC "couldn't do much with rates," so shippers were unlikely to supply that kind of information to the association. However, he did shed some light on the chemical industry's woes. "[NS] is adding charges for a lot of items — they're charging accessorial fees, fuel surcharges, all to squeeze more money out of captive shippers. We've done a study which indicates that almost two-thirds of chemical shippers' facilities are captive. So the railroads can charge higher rates, and the customer doesn't have much recourse."

"Part of their case [for taking over **Conrail**] was that they were going to reduce the number of trucks on the road and improve service, and I was told that rates wouldn't go up. Neither of the first two has happened," he said.

NS had no comment.

Correction:

Last week, **Rail Business** mistakenly attributed the following quote in Hot Spots to **CSX** spokeswoman Kathy Burns (**RB** 10/23/00, p.2): "We got another update from our rep, and part of it is a bridge issue. He said 'don't look for improvement for the next couple of months, as the [Memphis] bridge needs some repair.'" That quote should've been attributed to the shipper in question; we apologize for any confusion.

Rail Business

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2000, I served the foregoing document, Comments on Notice of Proposed Rulemaking, Served October 3, 2000 , by first-class, U.S. mail, postage prepaid, on all parties of record listed on the Board's official service list.

Thomas F. McFarland Jr.

Thomas F. McFarland, Jr.